SUPREME COURT, U. S.

MAY 16 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1122

THE FUND OF FUNDS, LTD.,
Petitioner,

—against—

ETHEL ROTH (suing as a stockholder in the name and in behalf of DREYFUS CORPORATION),
Respondent.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Fund of Funds, Ltd. petitions for a rehearing of the decision of this Court which denied on April 21, 1969 a petition for a writ of certiorari to the Court of Appeals for the Second Circuit. The record, opinions below, petition and briefs are before the Court.

This petition will be confined to a bare outline of the reasons why this Court should not permit this litigation to end with the patently erroneous determination of the courts below. To do so would be the avoidance of a significant issue with far reaching international law implications as to the extraterritorial power of this and other nations and potentially severe domestic economic consequences to the United States. Moreover, it would leave a confused

morass of existing decisions on the propriety and extent of the applicability of federal securities laws to essentially foreign transactions.

The petition for certiorari requested this Court's consideration of a singularly fundamental proposition—whether the statute set forth below means what it says. Section 30(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U. S. C. Section 78dd(b), provides:

> "*The provisions of this title* or of any rule or regulation thereunder *shall not apply* to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this title." (Emphasis added)

The only conceivable interpretations of the exemption provided by or, more properly, the expressly intended application of Section 30(b) are that it covers *foreign securities business transactions* in either

(1) securities of *foreign issuers on foreign securities exchanges* or other foreign markets;

(2) securities of *United States issuers on foreign securities exchanges* or other foreign markets; or

(3) securities of *United States issuers on United States securities exchanges* or other United States markets.

To suggest that Section 30(b) is intended to cover (1) above is absurd, for such transactions are so far beyond acceptable concepts of jurisdictional power that the mere enactment of a purported exemption would require a legislative arrogance offensive to attribute to the Congress. Nor

can (2) above have been intended, for this would necessitate an unwarranted assumption of legislative superfluity inasmuch as the subject matter of foreign securities exchanges is expressly covered by Section 30(a) and was intended so to be. There remains the only sensible interpretation—non-application to foreign-based transactions in securities of United States issuers on United States securities exchanges or other United States markets—which is precisely the factual situation in this litigation.

No one challenges the fact that petitioner is a person transacting "a business in securities without the jurisdiction of the United States" except for the astonishing doubt expressed by the Court of Appeals ". . . whether 'transacting a business in securities' can be read to cover the Fund's [Petitioner's] investing in securities . . ." (App. B, p. 9a). No one challenges the fact that petitioner did all that it could do with respect to the purchase and sale of the Dreyfus Corporation shares which are the subject of this litigation outside the United States. Obviously the decisions below were grounded upon the fact that a foreign person bought securities of a United States issuer listed on the New York Stock Exchange (the "Exchange") in the only practical way that a foreign person can buy such securities, namely, through use of the facilities of the Exchange.* Thus the mere purchase or sale of an Exchange listed security by a foreigner will subject the foreigner to the provisions of the Exchange Act.

This result flatly ignores the language "The provisions of this title . . . shall not apply . . ." Any reasonable construc-

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*The only other way petitioner could buy or sell a particular Exchange listed security would be the rare circumstance of finding the desired security listed and actively traded on a foreign exchange (extremely rare except for Canadian exchanges) or the purely fortuitous finding of another party abroad willing to buy or sell that security in a specified amount and the arrangement of a private "off board" transaction. However, the Exchange itself has done everything it can do to discourage private transactions. See, *e.g.*, Rule 394 of the Rules of the New York Stock Exchange.

tion of this language means that *no* provision of the Exchange Act shall apply under these circumstances. The determinations below, however, mean that at least *some* provisions, specifically Section 16(b), apply, and for all that any foreigner (or, for that matter, any United States citizen) can ascertain, *all* provisions of the Exchange Act would apply

This can only impair international relations by imposing an admittedly arbitrary liability provision upon foreigners who have no reasonable way to anticipate the application of what to them must seem an incomprehensible and unconscionably penal sanction on wholly innocent activity. It also conveys to foreigners the impression that the United States is willing to apply its laws when the statutes themselves expressly state their inapplicability, a theory of international law unknown outside of totalitarian states.

Finally, the results can only discourage foreign investment in United States securities. If the Tasmanian resident or the German banker realizes that he risks Exchange Act jurisdiction merely by purchasing a United States security, he will rarely find the risk of unknown legal hazards worthwhile. As demonstrated in the petition, foreign investment in United States securities—indeed, probably such investments by this petitioner—saved the United States from a balance of payments deficit in 1968 for the first time in many years.

For almost 35 years the Securities and Exchange Commission has not chosen to exercise the rulemaking authority expressly conferred upon it in Section 30(b) in any respect. Surely it does not need, nor is it desirable to have, the judiciary exercising its rulemaking function. No policy reason has been given for the application of a penal provision in contravention of the express terms of the Exchange Act. To the contrary, such application can only have adverse

domestic and international policy impacts. Accordingly and for the other reasons advanced in the petition, this Court is respectfully requested to reconsider its denial of the petition for a writ of certiorari and grant petitioner a rehearing in that connection.

Respectfully submitted,

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May 16, 1969

CERTIFICATE OF COUNSEL

The undersigned, Allan F. Conwill, being attorney for Petitioner, hereby certifiies that the foregoing Petition for Rehearing is presented in good faith and not for delay, and said Petition is restricted to the ground above specified.

ALLAN F. CONWILL